BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

*** * * * * * ***

APPLICATION FOR BENEFICIAL WATER USE PERMIT NO. 43Q 30158778 BY MYRON & NANCY GROSS	)))	**PRELIMINARY DETERMINATION TO GRANT PERMIT**

*** * * * * * ***

On March 24, 2023, Myron and Nancy Gross (Applicant) submitted Application for Beneficial Water Use Permit No. 43Q 30158778 to the Billings Water Resources Office of the Department of Natural Resources and Conservation (Department or DNRC) for 570 GPM (1.27 CFS) and 79.1 AF for multiple domestic and lawn and garden purposes. The Department published receipt of the Application on its website. The Application was determined to be correct and complete as of July 14, 2023. The Department met with Travis West and Jeremy Eaton, consulting engineers for the Applicant, on November 9, 2022. Christine Schweigert, Mark Elison and Jill Lippard were present for the Department. An Environmental Assessment for this Application was completed on October 20, 2023.

INFORMATION

The Department considered the following information submitted by the Applicant, which is contained in the administrative record.

Application as filed:

- Application for Beneficial Water Use Permit, Form 600-GW
- Attachments
- Maps:
    - Lot layout map showing locations of proposed wells, drainfields, homes, and hydraulic gradient direction.
    - Two enlarged lot layout maps, for the east and west halves of the subdivision, showing detailed locations of proposed wells, drainfields, homes, and easements for shared wells.

    - Topographic map showing general project location.
    - Topographic map submitted for aquifer testing addendum showing general project location as well as production and observation well locations. The layout features an inset map enlarged to show detail and point out distance between the wells and the pump test discharge point.
- Aquifer Test Data Form 633 in printed and electronic format for a 72-hour aquifer test.
- Form 600-ATA and required attachments.
- Diagram of a typical domestic well including but not limited to casing, ventilated cap, pitless adaptor, electrical lines, pump cable, pump with check valve, depth, and lithology.
- Water well pump design specification worksheet including calculations for elevation head, friction loss, pressure head, total dynamic head, and residual pressure.
- Pump curve for 4-inch tri-seal pumps rated at 15 GPM labeled as a typical well pump curve.
- Specification sheet for 4-inch tri-seal pumps rated at 15 GPM showing rated capacities based on different horsepower (HP) pumps ranging from ½ horse to 1½ horse.

<u>Information Received after Application Filed</u>

- Two variance request letters dated April 5 and April 11, 2023. These letters requested variance from aquifer testing rules under Administrative Rules of Montana (ARM) 36.12.121 (3)(a) and 36.12.121 (3)(f) which cover maintaining constant discharge rate during testing and requiring drawdown and yield tests on additional production wells, respectively.
- Variance approval letter dated April 19, 2023.
- Email dated March 24, 2023, from Christine Schweigert, Billings Regional Office Hydrologist, to Travis West of Engineering West, consulting engineer for the Applicant, discussing the need for an original signature on the application.
- Email chain dated March 29 and March 30, 2023, between Billings Regional Office Manager Mark Elison and Water Sciences Bureau Supervisor Jake Mohrmann discussing the aquifer test report, form 633, submitted with the application.

- Email chain dated April 3 through April 5, 2023, between Billings Regional Office Hydrologist Christine Schweigert and the applicant's consultant, Travis West, discussing variance requests, the need for drawdown and yield tests on additional wells, a correction to a legal land description, and clarifying the number of wells.
- Email dated April 21, 2023, from Travis West to Christine Schweigert stating the name of the Onyx Subdivision was changed to Onyx Pointe Subdivision.

Information within the Department's Possession/Knowledge

- Groundwater Permit Application Technical Report by Department Hydrologists Christine Schweigert and Jack Landers dated July 14, 2023.
- Groundwater Permit Report by Department Hydrologist, Jack Landers, dated June 16, 2023.
- DNRC Water Right Database.
- DNRC Canyon Creek @ Zoo Montana gage 43Q 05900 (period of record May 5, 2016 – June 23, 2023).
- Hydrogeology of the West Billings Area: Impacts of Land-Use Changes on Water Resources, John Olson & Jon Reiten (2002), Montana Bureau of Mines and Geology, Report of Investigation 10.
- The Department also routinely considers the following information. The following information is not included in the administrative file for this Application but is available upon request. Please contact the Billings Regional Office at 406-247-4415 to request copies of the following documents.
    - DNRC Technical Memorandum: Variance-Yellowstone River Terrace Level 3 Aquifer Properties dated March 1, 2022.
    - DNRC Technical Memorandum: Net Surface Water Depletion from Ground Water Pumping dated July 6, 2018.
    - Consumptive Use Methodology Memo dated March 17, 2010.

The Department has fully reviewed and considered the evidence and argument submitted in this Application and preliminarily determines the following pursuant to the Montana Water Use Act (Title 85, chapter 2, part 3, MCA). **NOTE:** Department or DNRC means the Department of Natural Resources & Conservation; CFS means cubic feet per second; GPM means gallons per minute; AF means acre-feet; AC means acres; AF/YR means acre-feet per year; and POD means point of diversion.

PROPOSED APPROPRIATION

FINDINGS OF FACT

1. The Applicant proposes to divert groundwater from the Yellowstone River Terrace 3 alluvial aquifer, by means of 37 wells, from January 1 to December 31 for multiple domestic use and from May 1 to October 1 for lawn and garden use at 570 GPM (1.27 CFS) up to 79.1 AF, from 37 points of diversion in the S2NE Sec. 19, T1S, R25E, Yellowstone County in the proposed Onyx Pointe Subdivision (COS 3753, Parcel 3). The Applicant proposes a 35-lot subdivision with individual wells for domestic and lawn and garden uses. The Applicant proposes to irrigate two parks with one well located on proposed Lot 25 and irrigate proposed Utility Lot 3 with another well located on Utility Lot 3. The total irrigated area covers 24.75 acres. The place of use is generally located in the S2NE Sec. 19, T1S, R25E, Yellowstone County in the proposed Onyx Pointe Subdivision (COS 3753, Parcel 3).

2. The proposed subdivision is located near Canyon Creek (1,300 ft away), Big Ditch (5,700 ft way), Billings Bench Water Association canal (10,600 ft away), and Hogans Slough (12,300 ft away).

3. The Applicant requests 17.22 AF for domestic use, of which, 15.5 AF will return to the source aquifer based on the results of studies by Kimsey and Flood (1987), Vanslyke and Simpson (1974), and Paul, Poeter, and Laws (2007) which conclude that the percent of consumption for domestic use by individual drainfields is 10%. The Applicant requests 61.87 AF for 24.75 acres of lawn and garden, of which, 29.5 AF will return to the source aquifer based on the net irrigation requirement from IWR using DNRC standard inputs for dry year, having

IWR re-calculate start and end date using default temperature, 1-inch net irrigation application and 0.25-inches of carryover moisture at the beginning and end of growing season.

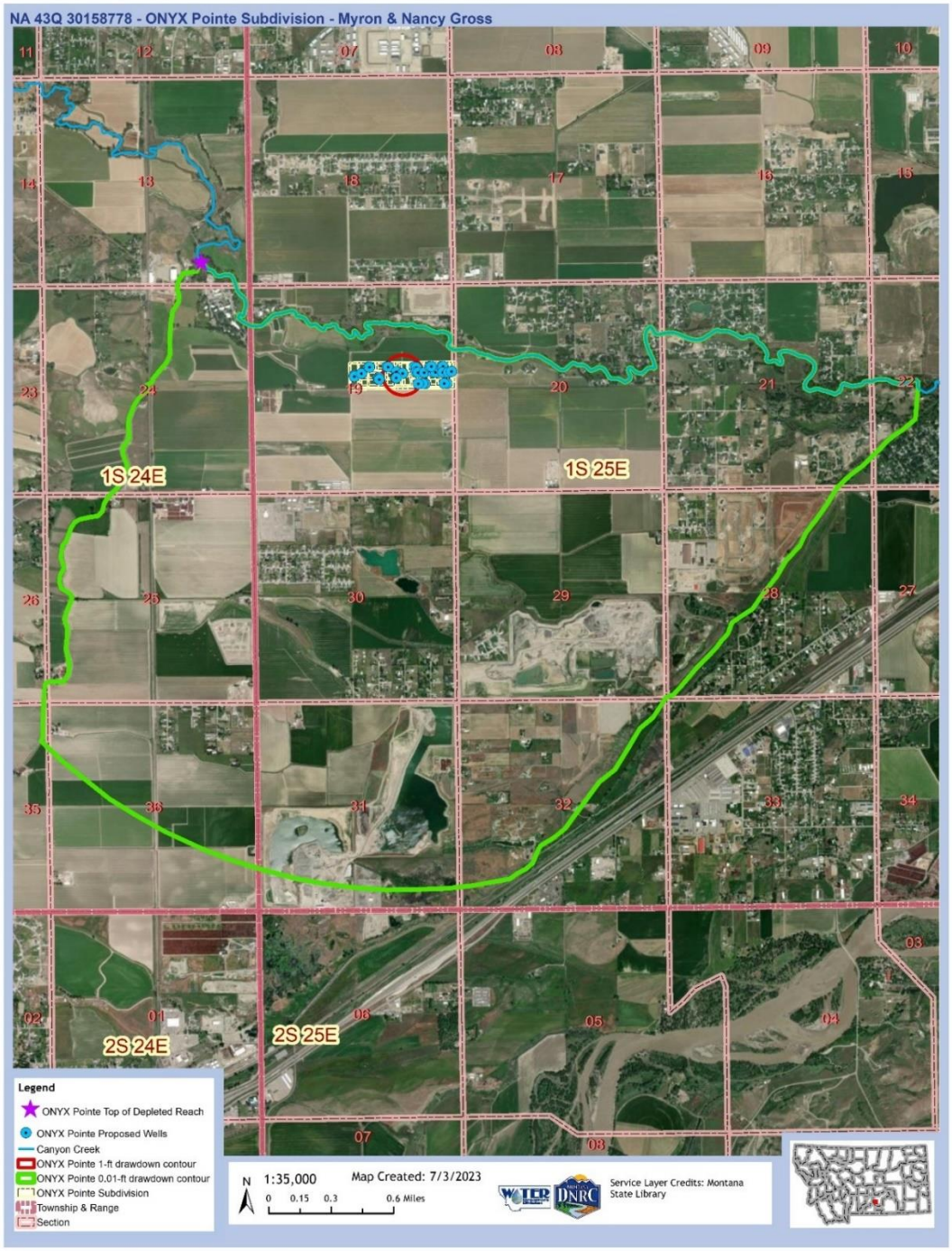

Figure 1. Onyx Pointe Subdivision point of diversion, place of use, and zone of influence.

§ 85-2-311, MCA, BENEFICIAL WATER USE PERMIT CRITERIA

GENERAL CONCLUSIONS OF LAW

4. The Montana Constitution expressly recognizes in relevant part that:

> (1) All existing rights to the use of any waters for any useful or beneficial purpose are hereby recognized and confirmed.
> (2) The use of all water that is now or may hereafter be appropriated for sale, rent, distribution, or other beneficial use . . . shall be held to be a public use.
> (3) All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law.

Mont. Const. Art. IX, §3. While the Montana Constitution recognizes the need to protect senior appropriators, it also recognizes a policy to promote the development and use of the waters of the state by the public. This policy is further expressly recognized in the water policy adopted by the Legislature codified at § 85-2-102, MCA, which states in relevant part:

> (1) Pursuant to Article IX of the Montana constitution, the legislature declares that any use of water is a public use and that the waters within the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided in this chapter. . . .
> (3) It is the policy of this state and a purpose of this chapter to encourage the wise use of the state's water resources by making them available for appropriation consistent with this chapter and to provide for the wise utilization, development, and conservation of the waters of the state for the maximum benefit of its people with the least possible degradation of the natural aquatic ecosystems. In pursuit of this policy, the state encourages the development of facilities that store and conserve waters for beneficial use, for the maximization of the use of those waters in Montana . . .

5. Pursuant to § 85-2-302(1), MCA, except as provided in §§ 85-2-306 and 85-2-369, MCA, a person may not appropriate water or commence construction of diversion, impoundment, withdrawal, or related distribution works except by applying for and receiving a permit from the Department. See § 85-2-102(1), MCA. An applicant in a beneficial water use permit proceeding must affirmatively prove all of the applicable criteria in § 85-2-311, MCA. Section § 85-2-311(1) states in relevant part:

… the department shall issue a permit if the applicant proves by a preponderance of evidence that the following criteria are met:

(a) (i) there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; and

(ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:

(A) identification of physical water availability;

(B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and

(C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

(b) the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. In this subsection (1)(b), adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied;

(c) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(d) the proposed use of water is a beneficial use;

(e) the applicant has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit;

(f) the water quality of a prior appropriator will not be adversely affected;

(g) the proposed use will be substantially in accordance with the classification of water set for the source of supply pursuant to 75-5-301(1); and

(h) the ability of a discharge permit holder to satisfy effluent limitations of a permit issued in accordance with Title 75, chapter 5, part 4, will not be adversely affected.

(2) The applicant is required to prove that the criteria in subsections (1)(f) through (1)(h) have been met only if a valid objection is filed. A valid objection must contain substantial credible information establishing to the satisfaction of the department that the criteria in subsection (1)(f), (1)(g), or (1)(h), as applicable, may not be met. For the criteria set forth in subsection (1)(g), only the department of environmental quality or a local water quality district established under Title 7, chapter 13, part 45, may file a valid objection.

To meet the preponderance of evidence standard, "the applicant, in addition to other evidence demonstrating that the criteria of subsection (1) have been met, shall submit hydrologic or other evidence, including but not limited to water supply data, field reports, and other information developed by the applicant, the department, the U.S. geological survey, or the U.S. natural resources conservation service and other specific field studies." § 85-2-311(5), MCA (emphasis added). The determination of whether an application has satisfied the § 85-2-311, MCA criteria is committed to the discretion of the Department. Bostwick Properties, Inc. v. Montana Dept. of Natural Resources and Conservation, 2009 MT 181, ¶ 21. The Department is required grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Id. A preponderance of evidence is "more probably than not." Hohenlohe v. DNRC, 2010 MT 203, ¶¶33, 35.

6. Pursuant to § 85-2-312, MCA, the Department may condition permits as it deems necessary to meet the statutory criteria:

> (1) (a) The department may issue a permit for less than the amount of water requested, but may not issue a permit for more water than is requested or than can be beneficially used without waste for the purpose stated in the application. The department may require modification of plans and specifications for the appropriation or related diversion or construction. The department may issue a permit subject to terms, conditions, restrictions, and limitations it considers necessary to satisfy the criteria listed in 85-2-311 and subject to subsection (1)(b), and it may issue temporary or seasonal permits. A permit must be issued subject to existing rights and any final determination of those rights made under this chapter.

E.g., Montana Power Co. v. Carey (1984), 211 Mont. 91, 96, 685 P.2d 336, 339 (requirement to grant applications as applied for, would result in, "uncontrolled development of a valuable natural resource" which "contradicts the spirit and purpose underlying the Water Use Act."); see also, *In the Matter of Application for Beneficial Water Use Permit No. 65779-76M by Barbara L. Sowers* (DNRC Final Order 1988)(conditions in stipulations may be included if it further compliance with statutory criteria); *In the Matter of Application for Beneficial Water Use Permit No. 42M-80600 and Application for Change of Appropriation Water Right No. 42M-036242 by Donald H. Wyrick* (DNRC Final Order 1994); Admin. R. Mont. (ARM) 36.12.207.

7. The Montana Supreme Court further recognized in Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner (1996), 278 Mont. 50, 60-61, 923 P.2d 1073, 1079, 1080, *superseded by legislation on another issue*:

> Nothing in that section [85-2-313], however, relieves an applicant of his burden to meet the statutory requirements of § 85-2-311, MCA, before DNRC may issue that provisional permit. Instead of resolving doubts in favor of appropriation, the Montana Water Use Act requires an applicant to make explicit statutory showings that there are unappropriated waters in the source of supply, that the water rights of a prior appropriator will not be adversely affected, and that the proposed use will not unreasonably interfere with a planned use for which water has been reserved.

See also, Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order* (2011). The Supreme Court likewise explained that:

> .... unambiguous language of the legislature promotes the understanding that the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights.

Montana Power Co., 211 Mont. at 97-98, 685 P.2d at 340; see also Mont. Const. art. IX §3(1).

8. An appropriation, diversion, impoundment, use, restraint, or attempted appropriation, diversion, impoundment, use, or restraint contrary to the provisions of § 85-2-311, MCA is invalid. An officer, agent, agency, or employee of the state may not knowingly permit, aid, or assist in any manner an unauthorized appropriation, diversion, impoundment, use, or other restraint. A person or corporation may not, directly or indirectly, personally or through an agent, officer, or employee, attempt to appropriate, divert, impound, use, or otherwise restrain or control waters within the boundaries of this state except in accordance with this § 85-2-311, MCA. § 85-2-311(6), MCA.

9. The Department may take notice of judicially cognizable facts and generally recognized technical or scientific facts within the Department's specialized knowledge, as specifically identified in this document. ARM 36.12.221(4).

Physical Availability

FINDINGS OF FACT

10. The Applicant performed a 72-hour aquifer test on a production well located on proposed Lot 14. An observation well located on Lot 13 was completed in the same aquifer approximately 30 ft. from the production well. The Lot 14 production well was pumped at an average flow rate of 42 GPM. The Applicant requested a variance from ARM 36.12.121 (3)(a) requiring a constant discharge rate on April 5, 2023, because the pumping rate fluctuated during testing, and from ARM 36.12.121 (3)(f) requiring drawdown and yield tests on additional production wells on April 11, 2023, because the Applicants are aware that DNRC has sufficient data on properties of the source aquifer to model the proposed appropriation. The proposed project meets the parameters defined in the Yellowstone River Terrace Level 3 Aquifer Properties Memo. The variance requests were granted on April 19, 2023.

11. Department Hydrologist Jack Landers analyzed the aquifer test data and issued a Groundwater Permit Report on June 16, 2023. The 37 proposed wells were modeled as one well using the Theis (1935) unconfined solution. Recommended values for transmissivity and storativity for physical availability are 6,000 ft^2/day, based on aquifer properties given in Yellowstone River Terrace Level 3 Aquifer Properties Memo and 0.1, taken as a literature value for unconfined sand and gravel aquifers, respectively. Using a constant pumping rate of 49.1 GPM (flow rate to produce the requested volume over the proposed period of diversion), the modeled 0.01-ft drawdown contour occurs at 13,000 ft. from the proposed wells. The drawdown contour is truncated at the edge of the Yellowstone River alluvium (Qat3 boundary) to the east and west as well as to Canyon Creek to the north (Figure 1). The volume of total aquifer flux each year within the zone of influence is given by the equation Q = TWi, where T is transmissivity, W is the width of the zone of influence (taken at 17,500 ft.) and i is the groundwater gradient (0.003 ft/ft from Olson, 2005). The volume of total aquifer flux each year within the zone of influence as defined by 0.01 foot of drawdown is 315,000 ft^3/day or 2,639 AF/YR.

12. The Department finds that the amount of groundwater physically available at the proposed point of diversion is 2,639 AF/YR.

CONCLUSIONS OF LAW

13. Pursuant to § 85-2-311(1)(a)(i), MCA, an applicant must prove by a preponderance of the evidence that "there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate."

14. It is the applicant's burden to produce the required evidence. *In the Matter of Application for Beneficial Water Use Permit No. 27665-41I by Anson* (DNRC Final Order 1987)(applicant produced no flow measurements or any other information to show the availability of water; permit denied); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005).

15. An applicant must prove that at least in some years there is water physically available at the point of diversion in the amount the applicant seeks to appropriate. *In the Matter of Application for Beneficial Water Use Permit No. 72662s76G by John Fee and Don Carlson* (DNRC Final Order 1990); *In the Matter of Application for Beneficial Water Use Permit No. 85184s76F by Wills Cattle Co. and Ed McLean* (DNRC Final Order 1994).

16. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate. § 85-2-311(1)(a)(i), MCA. (FOF 10-12)

Legal Availability:

FINDINGS OF FACT

17. Department Hydrologist Jack Landers modeled the drawdown from the proposed appropriation after 5 years of pumping. The model predicted that the 0.01-foot drawdown contour or zone of influence (ZOI) would occur 13,000 ft. from the Applicant's well. Based on a 0.01-foot drawdown contour at 13,000 ft. from the proposed wells truncated at the edge of the Yellowstone River alluvium and at Canyon Creek, Mr. Landers determined that there are 334 active groundwater rights within the zone of influence. A list of these water rights is in the file. Of those, 305 are Ground Water Certificates, 3 are Exempt Rights, 19 are Statements of Claim, and 7 are Provisional Permits. There are 46 Ground Water Certificates for which no volume is

recorded in the database. The legal demand for each of these water rights was taken as 3.11 AF representing the average volume of the 259 Ground Water Certificates for which volumes are recorded. Statements of Claim with no listed volume were assigned volumes. Domestic claims were assigned 1.5 AF, stock claims were assigned 0.034 AF/AU, and the irrigation claim was assigned 4.1 AF/AC representing the low-end Department standard for flood irrigation in Climatic Area 1. The Department Standard of 4.1 AF/AC for Climatic Area 1 was applied to the water rights for this analysis because this the most conservative approach for estimating the volume associated with these water rights. The total annual legal demand on groundwater within the zone of influence is 1,808.38 AF/YR. Below is a comparison of the water supply and current legal demands for groundwater.

Table 1. Comparison of physically available groundwater to legal demands

Physically Available (AF/year)	Existing Legal Demands (AF/year)	Physically Available minus Existing Legal Demands (AF/year)
2,639	1,808.38	830.62

18. The June 16, 2023, Groundwater Permit Report by Jack Landers concludes that surface water depletion from the proposed wells will be to Canyon Creek. The depleted reach of Canyon Creek is downstream of the SE¼ Sec. 13, T1S, R24E, Yellowstone County. Mr. Landers modeled the monthly depletions to Canyon Creek in flow rate (GPM) and in volume (AF) based on the Applicant's proposed appropriation after 5 years of pumping. The estimated monthly depletions to Canyon Creek are shown in the Table below.

Table 2. Modeled monthly depletions in volume (AF) and flow rate (GPM) to Canyon Creek

Month	Total Consumption (AF)	Canyon Creek Depletion (AF)	Canyon Creek Depletion (GPM)
January	0.1	1.4	10.3
February	0.1	1.2	9.7
March	0.1	1.0	7.7
April	0.1	0.9	7.1
May	5.1	2.6	18.7
June	8.9	5.2	39.1
July	12.2	7.7	56.6
August	11.1	8.8	64.4

September	5.4	7.2	54.1
October	1.6	4.5	33.2
November	0.1	2.7	20.1
December	0.1	1.8	13.0
Total	45.0	45.0	

19. The Department has operated a gage on Canyon Creek at Zoo Montana in SENESE Sec. 22, T1S, R25E, since May 2016. The gage is located approximately 5.6 miles downstream of the top of the depleted reach and about two miles upstream of the confluence with the Yellowstone River. There are 10 water rights between the gage and the top of the depleted reach.

Table 3. Water rights on Canyon Creek between the gage and the top of the depleted reach

Water Right Number	Owners	Purposes	Flow Rate (GPM)	Flow Rate (CFS)	Acres	Volume	Period of Diversion
43Q 8960 00	George L Lambrecht	Irrigation; Stock	596.90	1.33	60.00	175.00	04/30 to 10/31
43Q 8965 00	Dolores D Grover; George S Grover	Irrigation; Stock	498.16	1.11	10.00	28.00	04/30 to 10/31
43Q 30067817	Anna M Wilson; Robert A Wilson	Lawn And Garden	6.00	0.01	1.00	2.50	04/15 to 09/30
43Q 30115456	Geordie N Steilen; Sherri J Steilen	Stock	35.00*	0.08*	0.00	0.10	01/01 to 12/31
43Q 26726 00	Sally A Saunders	Irrigation	153.00	0.34	9.00	36.90*	06/01 to 09/30
43Q 39516 00	Randolph L Legare; Susan C Legare	Irrigation	264.00	0.58	15.00	61.50*	04/15 to 11/19
43Q 180005 00	Jerry J O'Donnell; Susan R O'Donnell	Irrigation	30.00	0.06	3.00	12.30*	03/01 to 11/30
43Q 199829 00	Yellowstone Boys And Girls Ranch Inc	Irrigation	340.00	0.75	20.00	82.00*	05/01 to 09/04
43Q 214609 00	Catherine McNally; Jim McNally; Judy C McNally; Teresa C McNally	Irrigation	297.50	0.66	17.50	71.75*	03/15 to 11/19

43Q 19983000	Yellowstone Boys And Girls Ranch Inc	Irrigation	119.00	0.26	7.00	28.70*	05/01 to 09/30

*Calculated by DNRC

20. These water rights were added to the gage measurements to determine the amount of water physically available at the top of the depleted reach. The volume for irrigation rights with no specified volume was taken as the number of acres times the low-end of the range for 45% efficiency flood irrigation in Climatic Area 1 (4.1 AF/AC). A portion of the places of use associated with these water rights fall within Climatic Area 1 and a portion of the places of use fall within Climatic Area 2. The Department Standard of 4.1 AF/AC for Climatic Area 1 was applied to the water rights for this analysis because this the most conservative approach for estimating the volume associated with these water rights. Stock direct water rights were assigned 35 GPM. Flow rate in CFS is converted to volume by multiplying the mean monthly flow by 1.98 and by the number of days in a month. The distribution of flow rate and volume by month for these water rights is in the file under the Processing Information and Correspondence flag.

Table 4. Physically available flow on Canyon Creek by month (CFS)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of Mean Monthly Flow at Gage (CFS)	8.73	9.6	12.66	40.49	127.53	142.74	90.53	114.77	162.13	132.66	22.40	8.92
Legal Demands Between Gage and Top of Depleted Reach (CFS)	1.19	1.19	1.91	2.50	4.84	5.18	5.18	5.18	4.43	3.82	3.82	1.19
Physical Availability of Water at Top of the Depleted Reach (CFS)	9.92	10.79	14.57	42.99	132.37	147.92	95.71	119.95	166.56	136.48	26.22	10.11

Table 5. Physically available volume on Canyon Creek by month (AF)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Median of Mean Monthly Volume at Gage (AF)	535.82	532.32	777.11	2,405.01	7,827.87	8,478.95	5,556.43	7,044.52	9,630.24	8,142.89	1,330.76	547.77
Legal Demands Between Gage and Top of Depleted Reach (AF)	0.09	0.08	5.78	15.56	79.20	85.72	88.57	88.57	68.93	52.91	12.23	0.09
Physical Availability of Water at Top of the Depleted Reach (AF)	535.91	532.40	782.89	2,420.58	7,907.07	8,564.67	5,645.01	7,133.10	9,699.17	8,195.80	1,342.98	547.86

21. The area of potential impact on Canyon Creek is the entire reach of Canyon Creek from the top of the depleted reach to the confluence with the Yellowstone River. This is an appropriate area of potential impact because it includes the entire stream below the top of the depleted reach. There are 11 water rights on Canyon Creek between the top of the depleted reach and the confluence with the Yellowstone River. The volume for irrigation rights with no specified volume was taken as the number of acres times the low-end of the range for 45% efficiency flood irrigation in climate area 1 (4.1 AF/AC). Stock direct water rights were assigned 35 GPM. The distribution of flow rate and volume by month for these water rights is in the file under the Processing Information and Correspondence flag.

Table 6. Water rights on Canyon Creek between the top of the depleted reach and the Yellowstone River

Water Right Number	Owners	Purposes	Flow Rate (GPM)	Flow Rate (CFS)	Acres	Volume	Period Of Diversion
43Q 896000	George L Lambrecht	Irrigation; Stock	596.90	1.33	60.00	175.00	04/30 to 10/31
43Q 896500	Dolores D Grover; George S Grover	Irrigation; Stock	498.16	1.11	10.00	28.00	04/30 to 10/31
43Q 30067817	Anna M Wilson; Robert A Wilson	Lawn And Garden	6.00	0.01	1.00	2.50	04/15 to 09/30
43Q 30115456	Geordie N Steilen; Sherri J Steilen	Stock	35.00*	0.08*	0.00	0.10	01/01 to 12/31
43Q 2672600	Sally A Saunders	Irrigation	153.00	0.34	9.00	36.90*	06/01 to 09/30
43Q 3951600	Randolph L Legare; Susan C Legare	Irrigation	264.00	0.58	15.00	61.50*	04/15 to 11/19
43Q 18000500	Jerry J O'Donnell; Susan R O'Donnell	Irrigation	30.00	0.06	3.00	12.30*	03/01 to 11/30
43Q 19982900	Yellowstone Boys And Girls Ranch Inc	Irrigation	340.00	0.75	20.00	82.00*	05/01 to 09/04
43Q 20648000	Connie M Hanson; Jerome D Hanson	Irrigation	350.00	0.77	20.00	82.00*	04/15 to 11/04
43Q 21460900	Catherine McNally; Jim McNally; Judy C McNally; Teresa C McNally	Irrigation	297.50	0.66	17.50	71.75*	03/15 to 11/19
43Q 19983000	Yellowstone Boys And Girls Ranch Inc	Irrigation	119.00	0.26	7.00	28.70*	05/01 to 09/30

*Calculated by DNRC

22. The legal demands between the top of the depleted reach and the confluence of Canyon Creek with the Yellowstone River were subtracted from the physically available water at the top of the depleted reach to determine if water was legally available.

Table 7. Physically available water on Canyon Creek by month (CFS)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Physical Availability Of Water At The Top Of The Depleted Reach (CFS)	10.86	10.28	14.17	51.53	154.86	130.27	91.90	103.23	166.55	135.50	23.78	9.55
Legal Demands On The Depleted Reach (CFS)	0.08	0.08	0.80	2.16	5.61	5.95	5.95	5.95	5.20	4.59	1.38	0.08
Physical Availability Of Water Minus Legal Demands (CFS)	10.79	10.20	13.37	49.38	149.26	124.32	85.95	97.28	161.36	130.91	22.40	9.48

Table 8. Physically available water on Canyon Creek by month (AF)

Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Physical Availability Of Water At The Top Of The Depleted Reach (AF)	662.0	565.5	826.7	2,994.5	9,287.9	7,516.2	5,411.8	6,106.8	9,699.3	8,135.8	1,342.9	581.7
Legal Demands On The Depleted Reach (AF)	0.0	0.0	6.3	22.2	91.8	97.9	101.1	101.1	81.1	65.5	13.7	0.01
Physical Availability Of Water Minus Legal Demands (AF)	662.0	565.5	820.5	2,972.3	9,196.1	7,418.3	5,310.6	6,005.7	9,618.2	8,070.3	1,329.2	581.7

23. There are five major irrigation ditches that cross Canyon Creek in the area west of Billings. The Cove, Big, Italian and High Ditches cross upstream of the depleted reach. The Billings Bench Water Association Ditch crosses Canyon Creek above the DNRC gage and below the top

of the depleted reach. These ditches and return flows from several smaller ditches draining fields add water to Canyon Creek during the irrigation season, generally April through October. The base flow in Canyon Creek, however, in November through March, when the ditches are not in operation is a minimum of 9.48 CFS which exceeds legal demands and modeled depletions. Physically available water minus legal demands within the depleted reach of Canyon Creek exceeds modeled depletions resulting from Applicant's request.

24. The flow rate and volume of water physically available minus all the legal demands within the area of impact for Canyon Creek exceeds the modeled depletion in all months. The Department finds that water is legally available in excess of modeled depletions.

CONCLUSIONS OF LAW

25. Pursuant to § 85-2-311(1)(a), MCA, an applicant must prove by a preponderance of the evidence that:

> (ii) water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the amount requested, based on the records of the department and other evidence provided to the department. Legal availability is determined using an analysis involving the following factors:
>
> (A) identification of physical water availability;
>
> (B) identification of existing legal demands on the source of supply throughout the area of potential impact by the proposed use; and
>
> (C) analysis of the evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water.

E.g., ARM 36.12.101 and 36.12.120; Montana Power Co., 211 Mont. 91, 685 P.2d 336 (Permit granted to include only early irrigation season because no water legally available in late irrigation season); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992).

26. It is the applicant's burden to present evidence to prove water can be reasonably considered legally available. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (the legislature set out the criteria (§ 85-2-311, MCA) and placed the burden of proof squarely on the applicant. The Supreme Court has instructed that

those burdens are exacting.); see also Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054 (burden of proof on applicant in a change proceeding to prove required criteria); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005))(it is the applicant's burden to produce the required evidence.); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions, LLC* (DNRC Final Order 2007)(permit denied for failure to prove legal availability); see also ARM 36.12.1705.

27. Pursuant to Montana Trout Unlimited v. DNRC, 2006 MT 72, 331 Mont. 483, 133 P.3d 224, the Department recognizes the connectivity between surface water and ground water and the effect of pre-stream capture on surface water. E.g., Wesmont Developers v. DNRC, CDV-2009-823, Montana First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 7-8; *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(mitigation of depletion required), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); see also Robert and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994) (affirming DNRC denial of Applications for Beneficial Water Use Permit Nos. 76691-76H, 72842-76H, 76692-76H and 76070-76H; underground tributary flow cannot be taken to the detriment of other appropriators including surface appropriators and ground water appropriators must prove unappropriated surface water, *citing* Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909), and Perkins v. Kramer, 148 Mont. 355, 423 P.2d 587 (1966)); *In the Matter of Beneficial Water Use Permit No. 80175-s76H by Tintzman* (DNRC Final Order 1993)(prior appropriators on a stream gain right to natural flows of all tributaries in so far as may be necessary to afford the amount of water to which they are entitled, *citing* Loyning v. Rankin (1946), 118 Mont. 235, 165 P.2d 1006; Granite Ditch Co. v. Anderson (1983), 204 Mont. 10, 662 P.2d 1312; Beaverhead Canal Co. v. Dillon Electric Light & Power Co. (1906), 34 Mont. 135, 85 P. 880); *In the Matter of Beneficial Water Use Permit No.* 63997-*42M by Joseph F. Crisafulli* (DNRC Final Order 1990)(since there is a relationship

between surface flows and the ground water source proposed for appropriation, and since diversion by applicant's well appears to influence surface flows, the ranking of the proposed appropriation in priority must be as against all rights to surface water as well as against all groundwater rights in the drainage.) Because the applicant bears the burden of proof as to legal availability, the applicant must prove that the proposed appropriation will not result in prestream capture or induced infiltration and cannot limit its analysis to ground water. § 85-2-311(a)(ii), MCA. Absent such proof, the applicant must analyze the legal availability of surface water in light of the proposed ground water appropriation. *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 By Utility Solutions LLC* (DNRC Final Order 2007) (permit denied); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 ; Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12.

28. Where a proposed ground water appropriation depletes surface water, applicant must prove legal availability of amount of depletion of surface water throughout the period of diversion either through a mitigation /aquifer recharge plan to offset depletions or by analysis of the legal demands on, and availability of, water in the surface water source. Robert and Marlene Takle v. DNRC *et al.*, Cause No. DV-92-323, Montana Fourth Judicial District for Ravalli County, *Opinion and Order* (June 23, 1994); *In the Matter of Beneficial Water Use Permit Nos. 41H 30012025 and 41H 30013629 by Utility Solutions LLC* (DNRC Final Order 2006)(permits granted), *affirmed*, Faust v. DNRC et al., Cause No. CDV-2006-886, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit 41H 30019215 by Utility Solutions LLC* (DNRC Final Order 2007*)*(permit granted), *affirmed*, Montana River Action Network et al. v. DNRC et al., Cause No. CDV-2007-602, Montana First Judicial District (2008); *In the Matter of Application for Beneficial Water Use Permit No. 41H 30023457 by Utility Solutions LLC* (DNRC Final Order 2007) (permit denied for failure to analyze legal availability outside of irrigation season (where mitigation applied)); *In the Matter of Application*

for Beneficial Water Use Permit No. 41H 30026244 by Utility Solutions LLC (DNRC Final Order 2008); *In the Matter of Application for Beneficial Water Use Permit No. 76H-30028713 by Patricia Skergan and Jim Helmer* (DNRC Final Order 2009)(permit denied in part for failure to analyze legal availability for surface water depletion); Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 5 (Court affirmed denial of permit in part for failure to prove legal availability of stream depletion to slough and Beaverhead River); Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pgs. 11-12 ("DNRC properly determined that Wesmont cannot be authorized to divert, either directly or indirectly, 205.09 acre-feet from the Bitterroot River without establishing that the water does not belong to a senior appropriator"; applicant failed to analyze legal availability of surface water where projected surface water depletion from groundwater pumping); *In the Matter of Application for Beneficial Water Use Permit No. 76D-30045578 by GBCI Other Real Estate, LLC* (DNRC Final Order 2011) (in an open basin, applicant for a new water right can show legal availability by using a mitigation/aquifer recharge plan or by showing that any depletion to surface water by groundwater pumping will not take water already appropriated; development next to Lake Koocanusa will not take previously appropriated water). Applicant may use water right claims of potentially affected appropriators as a substitute for "historic beneficial use" in analyzing legal availability of surface water under § 85-2-360(5), MCA. Royston, supra.

29. Use of published upstream gauge data minus rights of record between gauge and point of diversion adjusted to remove possible duplicated rights shows water physically available. Using same methodology and adding rights of record downstream of point of diversion to the mouth of the stream shows water legally available. *In the Matter of Application for Beneficial Water Use Permit No. 41P-105759 by Sunny Brook Colony* (DNRC Final Order 2001); *In the Matter of Application for Beneficial Water Use Permit No. 81705-g76F by Hanson* (DNRC Final Order 1992);

30. Applicant has proven by a preponderance of the evidence that water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, in the

amount requested, based on the records of the Department and other evidence provided to the Department.§ 85-2-311(1)(a)(ii), MCA. (FOF 17-24)

Adverse Effect

FINDINGS OF FACT

31. The Applicants propose to limit irrigation in the event of a water shortage or if a valid call is made. Restrictions could include limiting residential lot irrigation to limited days per week and limiting irrigation hours to night hours during low domestic usage. The Applicant proposed to draft covenants and restrictions that outline water usages during water shortage periods.

32. Department Hydrologist Jack Landers modeled drawdown in other wells using the aquifer properties above and a monthly pumping schedule (Table 9) accounting for domestic and lawn and garden uses. Modeled drawdown was greatest at the end of July of the fifth year of pumping. Drawdown equal to or greater than 1-foot occurs within 500 feet of the production well. No water rights exist within the 1-foot drawdown contour.

Table 9. Assumed monthly pumping schedule for the domestic/lawn & garden wells and park irrigation wells

Month	IWR Billings (in)	Domestic & Lawn & Garden Irrigation		Park Irrigation		Total	
		AF	GPM	AF	GPM	AF	GPM
January	0.0	1.4	10.5	0.0	0.0	1.4	10.5
February	0.0	1.4	11.6	0.0	0.0	1.4	11.6
March	0.0	1.4	10.5	0.0	0.0	1.4	10.5
April	0.4	1.4	10.8	0.0	0.0	1.4	10.8
May	2.7	8.3	60.6	0.2	1.2	8.5	61.8
June	4.8	13.6	102.9	0.3	2.2	13.9	105.1
July	6.6	18.2	133.0	0.4	3.0	18.6	135.9
August	6.0	16.7	121.8	0.4	2.7	17.0	124.5
September	2.9	8.8	66.4	0.2	1.4	9.0	67.8
October	0.8	3.5	25.3	0.0	0.4	3.5	25.7
November	0.0	1.4	10.8	0.0	0.0	1.4	10.8
December	0.0	1.4	10.5	0.0	0.0	1.4	10.5
Total	24.2	77.6		1.5		79.1	

33. The volume of groundwater legally available is greater than the Applicants' proposed use.

34. The flow rate and volume of water physically available minus all legal demands within the area of impact for Canyon Creek exceeds the modeled depletion in all months.

35. Based on available water in excess of legal demands on depleted surface water sources, groundwater modeling that indicates that no water rights would experience drawdown equal to or in excess of one foot, and the Applicants' plan to prevent adverse effect from groundwater appropriation, the Department finds that the proposed appropriation will not cause adverse effect to existing water rights or reservations.

CONCLUSIONS OF LAW

36. Pursuant to § 85-2-311(1)(b), MCA, the Applicant bears the affirmative burden of proving by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. Analysis of adverse effect must be determined based on a consideration of an applicant's plan for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied. See Montana Power Co. (1984), 211 Mont. 91, 685 P.2d 336 (purpose of the Water Use Act is to protect senior appropriators from encroachment by junior users); Bostwick Properties, Inc. ¶ 21.

37. An applicant must analyze the full area of potential impact under the § 85-2-311, MCA criteria. *In the Matter of Beneficial Water Use Permit No. 76N-30010429 by Thompson River Lumber Company* (DNRC Final Order 2006). While § 85-2-361, MCA, limits the boundaries expressly required for compliance with the hydrogeologic assessment requirement, an applicant is required to analyze the full area of potential impact for adverse effect in addition to the requirement of a hydrogeologic assessment. Id. ARM 36.12.120(5).

38. Applicant must prove that no prior appropriator will be adversely affected, not just the objectors. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 4.

39. In analyzing adverse effect to other appropriators, an applicant may use the water rights claims of potentially affected appropriators as evidence of their "historic beneficial use." See

Matter of Application for Change of Appropriation Water Rights Nos. 101960-41S and 101967-41S by Royston (1991), 249 Mont. 425, 816 P.2d 1054.

40. It is the applicant's burden to produce the required evidence. E.g., Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7 (legislature has placed the burden of proof squarely on the applicant); *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005). (DNRC Final Order 2005). The Department is required to grant a permit only if the § 85-2-311, MCA, criteria are proven by the applicant by a preponderance of the evidence. Bostwick Properties, Inc. ¶ 21.

41. Section 85-2-311 (1)(b) of the Water Use Act does not contemplate a de minimis level of adverse effect on prior appropriators. Wesmont Developers v. DNRC, CDV-2009-823, First Judicial District Court, *Memorandum and Order*, (2011) Pg. 8.

42. The Applicant has proven by a preponderance of the evidence that the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state water reservation will not be adversely affected. § 85-2-311(1)(b), MCA. (FOF 31-35)

Adequate Diversion

FINDINGS OF FACT

43. Transmissivity for Adequacy of Diversion was modeled using the Theis (1935) solution with T = 7,203 ft^2/day (derived from the aquifer test and differing from the T used for physical availability analysis) and Sy (Storativity or Specific Yield) = 0.1. The predicted theoretical drawdown for the proposed wells was modeled for the period of diversion using the monthly pumping schedule identified in Table 9. Six wells were evenly distributed throughout the proposed subdivision for forward modeling to represent the location of the proposed 37 wells and simulate the effects of interference drawdown. The pumping schedule for domestic use shown in Table 9 was assigned to five wells and the irrigation schedule was assigned to one well. The production well on Lot 14 (domestic) well was pump tested for 72-hours at an average rate of 42 GPM. The observed drawdown was 2.83 ft. below the static water level of 15.0 ft. below

the top of casing (btc), leaving 21.17 ft. of available water column above the bottom of the well. Modeling by Jack Landers indicates the predicted total drawdown for the Lot 14 well using the pumping schedule in Table 9 is 2.27 ft. leaving 21.73 ft. of available water column. Modeling indicates the predicted total drawdown for the observation well on Lot 13 (park irrigation) well, using the pumping schedule in Table 9, is 1.0 foot, leaving 23.69 ft. of available water column. Total maximum drawdown was modeled as the sum of interference drawdown and predicted drawdown with well loss. Similar available water columns are predicted for the 35 other wells proposed, assuming that all wells are drilled to a comparable depth.

44. All wells will be drilled by a licensed well contractor and will be placed as designated on the subdivision plat. Each home will utilize a pressure tank distribution system. Domestic water will be plumbed into the home with 1-inch HDPE pipe that will convey it from the well casing to the mechanical room.

45. The entire system was designed by a professional engineer. The current consultant is Engineering West of Columbus, MT. The Department finds that the Applicant has demonstrated adequacy of diversion.

CONCLUSIONS OF LAW

46. Pursuant to § 85-2-311(1)(c), MCA, an Applicant must demonstrate that the proposed means of diversion, construction, and operation of the appropriation works are adequate.

47. The adequate means of diversion statutory test merely codifies and encapsulates the case law notion of appropriation to the effect that the means of diversion must be reasonably effective, i.e., must not result in a waste of the resource. *In the Matter of Application for Beneficial Water Use Permit No. 33983s41Q by Hoyt* (DNRC Final Order 1981); § 85-2-312(1)(a), MCA.

48. Applicant has proven by a preponderance of the evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate for the proposed beneficial use. § 85-2-311(1)(c), MCA (FOF 43-45).

Beneficial Use

FINDINGS OF FACT

49. The Applicant requests 570 GPM (1.27 CFS) flow rate and 79.1 AF volume for multiple domestic and lawn and garden uses. Multiple domestic and lawn and garden are recognized beneficial uses under the Montana Water Use Act.

50. The Applicant proposes well use for 35 homes, two parks and a utility lot. Water demand for domestic use was calculated using DEQ Circular-4 Table 3.1-1, gallons per day standards based on the number of bedrooms per home. Proposed in-home usage varies by lot and ranges from 400 to 575 gallons per day per home. The total volume for multiple domestic use is 17.22 AF. Lawn and garden volume was calculated using the DNRC standard of 2.5 AF/AC of lawn, garden, and parks. The total area irrigated is 28.53 acres and the total proposed volume for irrigation is 61.87 AF. The proposed flow rate is based on the engineer's design for well construction and pumps. The Department finds that the Applicant has demonstrated that the proposed use is a beneficial use of water.

CONCLUSIONS OF LAW

51. Under § 85-2-311(1)(d), MCA, an Applicant must prove by a preponderance of the evidence the proposed use is a beneficial use.

52. An appropriator may appropriate water only for a beneficial use. See also, § 85-2-301 MCA. It is a fundamental premise of Montana water law that beneficial use is the basis, measure, and limit of the use. E.g., McDonald, supra; Toohey v. Campbell (1900), 24 Mont. 13, 60 P. 396. The amount of water under a water right is limited to the amount of water necessary to sustain the beneficial use. E.g., Bitterroot River Protective Association v. Siebel, *Order on Petition for Judicial Review*, Cause No. BDV-2002-519, Montana First Judicial District Court, Lewis and Clark County (2003), *affirmed on other grounds*, 2005 MT 60, 326 Mont. 241, 108 P.3d 518; *In The Matter Of Application For Beneficial Water Use Permit No. 43C 30007297 by Dee Deaterly* (DNRC Final Order), *affirmed other grounds*, Dee Deaterly v. DNRC *et al*, Cause No. 2007-186, Montana First Judicial District, *Order Nunc Pro Tunc on Petition for Judicial*

Review (2009); Worden v. Alexander (1939), 108 Mont. 208, 90 P.2d 160; Allen v. Petrick (1924), 69 Mont. 373, 222 P. 451; *In the Matter of Application for Beneficial Water Use Permit No. 41S-105823 by French* (DNRC Final Order 2000).

53. Amount of water to be diverted must be shown precisely. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 3 (citing BRPA v. Siebel, 2005 MT 60, and rejecting applicant's argument that it be allowed to appropriate 800 acre-feet when a typical year would require 200-300 acre-feet).

54. It is the applicant's burden to produce the required evidence. Sitz Ranch v. DNRC, DV-10-13390, Fifth Judicial District Court, *Order Affirming DNRC Decision*, (2011) Pg. 7; *In the Matter of Application to Change Water Right No. 41H 1223599 by MGRR #1, LLC.*, (DNRC Final Order 2005); see also Royston; Ciotti.

55. Applicant proposes to use water for multiple domestic and lawn and garden which are recognized beneficial uses. § 85-2-102(5), MCA. Applicant proposes to use water for domestic use (which includes garden and landscaping irrigation, also commonly referred to as 'lawn and garden irrigation') which is a recognized beneficial use. § 85-2-102(5), MCA. "Domestic use" by DNRC rule means those water uses common to a household including: … (g) garden and landscaping irrigation up to five acres." ARM 36.12.101(22). Applicant has proven by a preponderance of the evidence multiple domestic and lawn and garden are beneficial uses and that 79.1 AF of diverted volume and 570 GPM of water requested is the amount needed to sustain the beneficial uses. § 85-2-311(1)(d), MCA. (FOF 49-50)

Possessory Interest

FINDINGS OF FACT

56. The Applicant signed the application form affirming the Applicant has possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use.

CONCLUSIONS OF LAW

57. Pursuant to § 85-2-311(1)(e), MCA, an Applicant must prove by a preponderance of the evidence that it has a possessory interest or the written consent of the person with the possessory interest in the property where the water is to be put to beneficial use, or if the proposed use has a point of diversion, conveyance, or place of use on national forest system lands, the applicant has any written special use authorization required by federal law to occupy, use, or traverse national forest system lands for the purpose of diversion, impoundment, storage, transportation, withdrawal, use, or distribution of water under the permit.

58. Pursuant to ARM 36.12.1802:

> (1) An applicant or a representative shall sign the application affidavit to affirm the following:
> (a) the statements on the application and all information submitted with the application are true and correct and
> (b) except in cases of an instream flow application, or where the application is for sale, rental, distribution, or is a municipal use, or in any other context in which water is being supplied to another and it is clear that the ultimate user will not accept the supply without consenting to the use of water on the user's place of use, the applicant has possessory interest in the property where the water is to be put to beneficial use or has the written consent of the person having the possessory interest.
> (2) If a representative of the applicant signs the application form affidavit, the representative shall state the relationship of the representative to the applicant on the form, such as president of the corporation, and provide documentation that establishes the authority of the representative to sign the application, such as a copy of a power of attorney.
> (3) The department may require a copy of the written consent of the person having the possessory interest.

59. The Applicant has proven by a preponderance of the evidence that it has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. § 85-2-311(1)(e), MCA. (FOF 56)

PRELIMINARY DETERMINATION

Subject to the terms, analysis, and conditions in this Order, the Department preliminarily determines that this Application for Beneficial Water Use Permit No. 43Q 30158778 should be GRANTED.

The Department determines the Applicant may divert water from the Yellowstone Terrace 3 alluvial aquifer (groundwater), by means of 37 wells, from January 1 to December 31 at 570 GPM (1.27 CFS) up to 79.1 AF, from 37 points in the proposed Onyx Pointe Subdivision (COS 3753, Parcel 3) in the S2NE Sec. 19, T1S, R25E, Yellowstone County, for multiple domestic use from January 1 to December 31 and lawn and garden use from May 1 to October 1. The applicant may irrigate lawn and garden on 24.75 acres. The place of use is located in the proposed Onyx Pointe Subdivision (COS 3753, Parcel 3) in the S2NE Sec. 19, T1S, R25E, Yellowstone County.

NOTICE

This Department will provide public notice of this Application and the Department's Preliminary Determination to Grant pursuant to §§ 85-2-307, MCA. The Department will set a deadline for objections to this Application pursuant to §§ 85-2-307, and -308, MCA. If this Application receives no valid objection or all valid objections are unconditionally withdrawn, the Department will grant this Application as herein approved. If this Application receives a valid objection, the application and objection will proceed to a contested case proceeding pursuant to Title 2 Chapter 4 Part 6, MCA, and § 85-2-309, MCA. If valid objections to an application are received and withdrawn with stipulated conditions and the department preliminarily determined to grant the permit or change in appropriation right, the department will grant the permit or change subject to conditions necessary to satisfy applicable criteria.

DATED this 24th day of October 2023.

/Original Signed by Mark Elison/
Mark Elison, Manager
Billings Regional Office
Department of Natural Resources and Conservation

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PRELIMINARY DETERMINATION TO GRANT was served upon all parties listed below on this 24th day of October 2023, by first class United States mail.

MYRON AND NANCY GROSS
21 OLD MILL ROAD
PARK CITY, MT 59063
MNGROSS@HOTMAIL.COM

TRAVIS WEST, PE, RS
ENGINEERING WEST
PO BOX 194
COLUMBUS, MT 59019
TRAVIS@ENGINEERING-WEST.COM

_____ _____

CHRISTINE SCHWEIGERT DATE